

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



STANLEY J. BANOS,

Charging Party,

v.

UNITED EDUCATORS OF SAN FRANCISCO,

Respondent.

Case No. SF-CO-655-E

PERB Decision No. 1764

April 21, 2005

Appearance: Stanley J. Banos, on his own behalf.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Stanley J. Banos (Banos) of a Board agent's dismissal of his unfair practice charge. The charge alleged that the United Educators of San Francisco (UESF) violated the Educational Employment Relations Act (EERA)¹ by failing to adequately represent him and therefore breaching its duty of fair representation. The Board agent dismissed the unfair practice charge on grounds that the supporting allegations failed to state a prima facie case and were likely untimely.

On appeal, Banos reasserts his contention that UESF provided inadequate representation related to his placement on administrative duty and termination, and for the first time provided the facts related to the basis for these steps.

¹EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

After review of the unfair practice charge, the amended charge, the warning and dismissal letters, and Banos' appeal, the Board finds that the charge was timely filed, but the facts alleged in the original and amended charge are insufficient to state a prima facie case.

DISCUSSION

Banos was a probationary teacher at Tenderloin Community School in the San Francisco Unified School District (District). He was a Special Education teacher for emotionally disturbed students. In his original charge he stated he was placed on administrative duty on November 24, 2003, and returned to work on December 15, 2003. He was questioned by District officials with UESF Representative Jocelyn Won present. He was again removed from the classroom in mid-February 2004. He was a probationary teacher and the District could terminate his employment with or without cause. He was notified on March 9, 2004, that he would not be rehired. In his amended charge he noted that negative documents had been placed in his personnel file.

Banos met with UESF President Dennis Kelly (Kelly) on or about February 15, 2004, and was told that the union would investigate the disciplinary matter. He met with a new Representative, Mary Anne Ahtye (Ahtye), on February 24 and several other times. He last met with her in mid or late March 2004. He told her at some point that he had retained private counsel, but still continued to meet with her. He knew he had been rejected on probation and would not return the next semester but he wanted the District to remove certain documents from his personnel file. He believed they were negative and might impact his future employment.

After approximately one month since the last meeting with Ahtye, Banos became concerned because he had not heard from her. He called her on April 22, 2004, and found out she had left town on personal business. He called Kelly the next day and again on April 27

without any response from Kelly. Just prior to his final meeting with the District (May 12, 2004) he called Kelly for the last time. He did not speak with Kelly but left a message conveying his feeling that he had not been represented appropriately and requested his union dues be returned.

Banos was represented by counsel at the final meeting with the District but there is no information in the charge indicating when the attorney was actually hired.

NOTICE

The Board agent incorporated facts from UESF's position statement in the warning and dismissal letters. The statement was not served on Banos or signed under penalty of perjury. Without first requiring UESF to provide a copy to Banos, with the signature under penalty of perjury, the Board agent should not have relied on UESF's position statement. PERB Regulation 32620(c)² requires:

The respondent shall be apprised of the allegations, and may state its position on the charge during the course of the inquiries. Any written response must be signed under penalty of perjury by the party or its agent with the declaration that the response is true and complete to the best of the respondent's knowledge and belief. Service and proof of service pursuant to Section 32140 are required.

In addition, PERB's introductory letter informs the parties, in bold type, that:

Any written response must be signed under penalty of perjury with a declaration that the response is true and complete to the best of the Respondent's knowledge and belief and must be served on the Charging Party.^[3]

²PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

³Because UESF's position statement was not filed within the parameters of PERB Regulation 32620(c) the Board did not consider it in formulating this decision.

TIMELINESS

The Board agent found that the charge was likely untimely. In cases alleging a breach of the duty of fair representation, the six-month statutory limitation period begins to run on the date when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (Los Rios College Federation of Teachers, CFT/AFT (Violett. et al.) (1991) PERB Decision No. 889.)

The charge was filed on October 28, 2004. The six-month statutory limitations period began to run April 28, 2004. To be timely filed Banos must have known or reasonably should have known on or after April 28, 2004, that UESF was no longer assisting him.

Banos called Kelly on April 27. It is reasonable to assume that Banos was expecting a response from Kelly to update him on the status of his case. It was not until just before his last meeting with the District on May 12, 2004, that Banos called Kelly one last time to complain about his lack of representation and request a refund of his union dues. This evidence indicates Banos did not understand until sometime between April 27 and the first two weeks of May 2004 that UESF would not provide further assistance. This shows that Banos timely filed his charge within six months of when he reasonably believed there would be no further assistance from UESF.

Even if Banos did hire an attorney as early as March 2004, obtaining an attorney does not automatically terminate a union's duty to represent a unit member fairly. In Valley of the Moon Teachers Association. CTA/NEA (McClure) (1996) PERB Decision No. 1165, the employee had the assistance of both the union and a private attorney. There, the employee's attorney advised her to seek the union's representation in matters involving contract violations while the attorney presumably represented her in extra-contract matters. At the employee's request, the union filed a grievance on her behalf and continued to represent her at meetings

with the school district. The union would not, however, provide information directly to her attorney. The Board stated that in areas where an employee chooses self representation, the union does not have an obligation to provide assistance. The holding there was that the union did not violate the duty of fair representation when it refused to provide information regarding the employee grievance directly to her private attorney. Retaining an attorney does not automatically terminate a union's duty of fair representation.

DUTY OF FAIR REPRESENTATION

Banos has alleged that the exclusive representative denied him the right to fair representation guaranteed by EERA section 3544.9 and thereby violated Section 3543.6(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258 (UTLA (Collins))). In order to state a prima facie violation of this section of EERA, charging party must show that the respondent's conduct was arbitrary, discriminatory or in bad faith. In UTLA (Collins), the Board stated:

Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations.]

A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a charging party:

"... must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (Emphasis added.)"

(Reed District Teachers Association, CTA/NEA (Revest (1983) PERB Decision No. 332, p. 9, citing Röcklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.)

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in Coalition of University Employees (Buxton) (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting Dutrisac v. Caterpillar Tractor Co. (9th Cir. 1983) 749 F.2d 1270 [113 LRRM 3532], at p. 1274; see also, Robesky v. Quantas Empire Airways Limited (9th Cir. 1978) 573 F.2d 1082 [98 LRRM 2090].)

Here, the first UESF representative attended the investigatory meeting with Banos. She stopped the meeting and took him outside to ask him what was going on. Banos also discussed his case with Kelly, the UESF president. Further, Banos asked for and received a second representative and he spoke with her several times.

Banos has not provided facts that indicate an arbitrary or bad faith effort on the part of UESF. As noted above, the union may exercise its discretion on how far to pursue a grievance so long as it does not arbitrarily ignore a meritorious grievance.

Even after receipt of the warning letter, Banos did not provide evidence to support a prima facie case of arbitrary or bad faith action or inaction by UESF. Therefore, even though timely filed, he did not meet his burden on the merits.

NEW ALLEGATIONS ON APPEAL

PERB Regulation 32635(b) provides that "[u]nless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." Banos has failed to demonstrate good cause for the presentation of new allegations and/or supporting

evidence on appeal, and nothing in the documents filed related to the appeal indicates there is good cause.

ORDER

The unfair practice charge in Case No. SF-CO-655-E is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Whitehead and Shek joined in this Decision.